No. 88-1818

Supreme Court, U.S.
FILED
MAY 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JAMES F. DROGOWSKI,
Petitioner

vs.

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
Respondent

PETITION FOR WRIT OF CERTIORARI

On Appeal from United States Court of Appeals for the Third Circuit in banc

(No. 88-3685)

Brief and Joint Appendix For Petitioner

April 27, 1989

James F. Drogowski, pro se
3316 Washington Pike
Bridgeville, Pennsylvania
15017

(412) 221-9396

cc. Kenneth J. Benson, Esq.,
Deputy Attorney General
Commonwealth of Pennsylvania
4 th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, Pennsylvania 15219

QUESTION PRESENTED

(a) Is one conviction an HABITUAL OFFENDER cruel and unusual punishment? (8 th Admendment of the U.S. Constitution)

REVIEWED JUDGMENTS

On Appeal from United States Court of Appeals for the Third Circuit in banc (No. 88-3685) dated March 8, 1989 affirming the decision of the Third Circuit Court of Appeals dated January 25, 1989, affirming the decision of the United States District Court for the Western District of Pennsylvania, (D.C. Civil Action No. 87-2166) dated September 27, 1988 dismissing.

On Appeal from Supreme Court of Pennsylvania, Western District Allocatur Docket 126 of 1986 dening appeal dated September 10, 1987 from the appeal of the Commonwealth Court of Pennsylvania, Allegheny County (CD No. 2938 of 1982 filed January 15, 1986) affirming the decision of the

Common Plea Court, Allegheny County, Pennsylvania (SA No. 506 of 1982) dated October 22, 1982 dismissing.

On Appeal from Common Plea Court of Pennsylvania, Washington County (No. 1088 of 1981) denied, dated August 27, 1982., forwarded from Criminal Court No. 1088 of 1981 Washington County, Pennsylvania dated July 22, 1982.

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CITIZENSHIP

Petitioner is a citizen of the United States of America.

STATEMENT OF JURISDICTION

Supreme Court of Pennsylvania W.D. denied petition of appeal (Allocatur Docket 126 of 1986).

The Sur Petition for Rehearing of the Court of Appeals for the Third Circuit in banc was denied March 8, 1989.

The jurisdiction of this court may be invoked pursuant to 28 U.S.C. § 451.

REASON FOR GRANTING WRIT

A. The Third Circuit Court of Appeals in banc denied Sur Petition of Rehearing dated March 8, 1989. Attached in Appendix pages 1&2

B. The Supreme Court of Pennsylvania, Western District denied Petition for Allowance of Appeal (Allocatur Docket No. 126 W.D. of 1986). Attached in Appendix pages 10 & 11.

C. Eighth Admendment to the U.S. Constitution is cited in page i question presented and page 15 of appendix.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment of the United States Constitution provides, "Excessive bail . . shall not be required, nor excessive fine imposed, NOR CRUEL AND UNUSUAL PUNISHMENT INFLICTED".

STATE STATUE INVOLVED

Section § 1542 of the vehicle code, Pa. C.S. provides;

(a) General rule. -- The department shall revoke the operating privilege of any person found to ge habitual offender pursuant to the provisions of this section A "habitual offender" shall be any person whose driving record as maintained in the department shows that such person has accumulated the requisite number of convictions for the separate and distinct offenses described and enumerated in subsection (b) ...

(b) Offenses enumerated. -- Three convictions arising from separate acts of any one or more of the following offenses committed eith singularly or in combination by any person shall result in such person being designated as a habitual offender.

STATEMENT OF THE CASE

1. On February 19, 1982 Petitioner was convicted of Driving while intoxicated and other charges.
2. On or about mail date June 17, 1982 Petitioner was notified by Pennsylvania Department of Transportation that Petitioner's drivers license was being suspended for being an "habitual offender".
3. On or about January 17, 1983 Petitioner returned driver's license to Pennsylvania Department of Transportation
4. Petitioner contested the validity of suspension of driver's license in state and federal courts.
5. Today April 5, 1989 petitioner has a learner's permit from the Pennsylvania Department of Transportation

ARUGMENT

Petitioner dosen't dispute Driving while intoxicated and the other charges but, disputes "HABITUAL OFFENDER" refering to 1 (one) date of conviction on February 19, 1982. Section § 1542 of Pa. vehicle code provides 3 (three) convictions to be "HABITUAL OFFENDER". This is an excessive fine imposed and cruel and unusual punishment (Trop v. Dulles, 356 U.S. 86 (1958).

Five (5) years petitioner had driver's license revoked for an "HABITUAL OFFENDER".

CONCLUSION

PETITIONER seeks modification of CA No. 88-3685 in the Third Circuit Court of Appeals.

Petitioner also seeks a monetary award of ($500,000.00) Five Hundred Thousand Dollars.

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3685

JAMES F. DROGOWSKI,
Appellant

vs.

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA COWEN, and NYGAARD, Circuit Judges

The petitition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the court,

_____

Walter K. Stapleton,
Circuit Judge

Dated: March 8, 1989

APPENDIX 2.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

James F. Drogowski,
Appellant

vs.

PA. Dept. of Trans.

Kenneth J. Benson, Esquire
Deputy Attorney General
4 th Floor, Manor Complex
Pittsburgh, PA. 15219
Attorney for Defendant

CA No 88-3685

Date, Jan 25, 89

ORDER

FEB 21 1989

The motion is granted with filing as of the date of this order.

FOR THE COURT

Sally Mrvos
Clerk

BEFORE: STAPELTON, GREENBERG, and SCIRICA, Circuit Judges

Motion for Rehearing of
Petition Nunc pro Tunc

I, James F. Drogowski motion for rehearing of petition CA No. 88-3685 nunc pro tunc.

APPENDIX 3.

Appellant received judgment order on Feb. 2, 1989 and mailed the request for rehearing on February 7, 1989. The fourth and fifth of February 1989 is a saturday and sunday. So this gave appellant three days of mailing of petition.

Appellant request the above court for a rehearing on the approbation of Five Hundred Thousand Dollars for the unusual punishment of "one conviction being an HABITUAL OFFENDER". Appellant respectfully prays that his motion for rehearing be granted.

Feb. 13, 1989

James F. Drogowski,
pro se
3316 Washington Pike
Bridgeville, PA
15017

cc: Kenneth J. Benson, Esq.

RECIEVED AND FILED

2/16/89

SALLY MRVOS, CLERK

APPENDIX 4.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3685

JAMES F. DROGOWSKI,
Appellant

vs.

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

On Appeal From the United States District Court For the Western District of Pennsylvania (Pittsburgh) (D.C. Civil Action No. 87-2166)
District Judge: Honorable Donald E. Ziegler

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

APPENDIX 5.

Costs taxed against appellant.

By the Court,

_____

Walter K. Stapleton,
Circuit Judge

APPENDIX 6.

ATTEST:

SALLY MRVOS, CLERK

Dated: JAN 25 1989

Costs taxed in favor of
appellee as follows:

Brief.....$27.44

Certified as a true copy and
issued in lieu of a formal mandate
on March 16, 1989.

Test:

M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court
of Appeals for the Third Circuit

COPY

APPENDIX 7.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES F. DROGOWSKI,	)	
	)	
Plaintiff,	)	
	)	C.A. 87-2166
vs.	)	
	)	
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION,	)	
	)	
Defendant,	)	

ORDER OF COURT

AND NOW, this 27 th day of September, 1988, after consideration of the motion to dismiss,

IT IS ORDERED that the complaint be and hereby is dismissed because (a) the action is barred, at least in part, by the Eleventh Amendment to the Constitution: (b) the Pennsylvania Department of Transportation is not a person under 42 U.S.C. § 1983: and (c) plaintiff litigated the instant claim in the state courts of Pennsylvania

and this action is barred by res judicata. Migra V. Warren City Schl., Dist., 465 U.S. 75, 75, 83 (1984).

Donald E. Ziegler
United States District Judge

cc: Kenneth J. Benson, Esq.
Mr. James F. Drogowski

APPENDIX 9.

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IRMA T. GARDNER
Deputy Prothonatary

801 City-County Bldg.
Pittsburgh, PA
15219
(412) 565-2816

September 11, 1987

Mr. James F. Drogowski
3316 Washington Pike
Bridgeville, Pa. 15017

In Re: Commonwealth v. James F. Drogowski
No. 126 W.D. Allocatur Docket 1986

Dear Mr. Drogowski:

The Court has entered the following Crder on your Petition for Allowance of Appeal in the above matter:

"PER CURIAM

AND NOW, this 10 th day of September, 1987, the Petition for Allowance of Appeal is denied."

APPENDIX 10.

Very truly yours,

IRMA T. GARDNER
DEPUTY PROTHONOTARY

ITG: cho

cc: Robert L. Eberhardt, Esq.
Hon. Ralph J. Cappy (Papadakos, J.)

APPENDIX 11.

JAMES F. DROGOWSKI, Appellant	:	IN THE COMMONWEALTH
	:	COURT OF PENNSYLVANIA
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	No. 2938 C.D. 1982
Appellee	:	

ORDER

NOW, January 15, 1986, the Order of the Court of Common Pleas of Allegheny County, No. S.A. 506 of 1982, dated October 22, 1982, is hereby affirmed.

_____

Joseph T. Doyle, Judge

JAMES F. DROGOWSKI, Appellant	:	
		IN THE COMMONWEALTH
v.	:	
		COURT OF PENNSYLVANIA
COMMONWEALTH OF	:	
PENNSYLVANIA	:	No. 2938 C.D. 1982
Appellee		

BEFORE: HONORABLE JOHN A MACPHAIL, Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE ALEXANDER F. BARBIERI,
Senior Judge

SUBMITTED ON BRIEFS: October 10, 1985

APPENDIX 13.

OPINION BY JUDGE DOYLE FILED JAN 15, 1986

James F. Drogowski (Appellant) appeals from the order of the Court of Common Pleas of Allegheny County which upheld the action of the Department of Transportation (Department) revoking Appellant's driver's license for a period of five years as a habitual offender under Section 1542 of the Vehicle Code (Code), 42 Pa. C.S. § 1542.

On Febr uary 19, 1982, Appellant pled guilty to criminal charges arising from an incident which occured on September 21, 1981. As a result of Appellant's conviction of Driving under the influence of alchol[1], Driving without lights to avoid identification or arrest[2], and Fleeing or attempting to elude a police officer[3], the Department revoked Appellant's driver's license for a period of five years under

Section 1542 of the Vehicle Code. The court of common pleas upheld the Department's determination, and appeal to this court followed.

On appeal, Appellant contends that Section 1542 of the Vehicle Code is unconstitutional as applied to this factual situation in that it constitutes cruel and unusual punishment in violation of Article 1, Section 13 of the Constitution of the Commonwealth of Pennsylvania, and the 8th Amendment to the Constitution of the United States.

Section 1542 provides:

(a) General rule. -- The department shall revoke the operating privilege of any person to be a habitual offender pursuant to the provisions of this section. A "habitual offender" shall be any person whose driving record, as maintained in the

department, shows that such person has accumulated the requisite number of convictions for the separate and distinct offenses described and enumerated in subsection (b)....

(b) Offenses enumerated. -- Three convictions arising from separate acts of any one or more of the following offenses committed either singularly or in combination by any person shall result in such person being designated as a habitual offender:

(1) Any offense set forth in Section 1532 (relating to revocation or suspension of operating privilege).[4]

Appellant contends that the revocation in the present case constitutes "cruel and unusual punishment" in view of the fact that the convictions giving rise to his revocation were all the result of a single

incident, caused by Appellant's schizophrenia and alcohol addiction, for which he later received treatment.

It is well settled that the Constitutional limitation against cruel and unusual punishment referred to in Article 1, Section 13 of the Pennsylvania Constitution applies only in criminal cases. Moselein v. State Board of Pharmacy, 60 Pa. Commonwealth Ct. 574, 432 A. 2d 295 (1981).[5] Since the suspension or revocation of a driver's license is a civil proceeding, Callan v. Department of Transportation, Bureau of Traffic Safety, 19 Pa. Commonwealth Ct. 635, 339 A.2d 163 (1975), the constitutional limitation has no direct application. Appellant, however, cites Moselein and Carr v. State Board of Pharmacy, 48 Pa. Commonwealth Ct. 330, 409, A. 2d 941 (1980), for the proposition

that the principle embodied in the constitutional limitation against cruel and unusual punishment is applicable to all proceedings. While this "principle" is indeed applicable to all proceedings, its application to civil proceedings occurs only when the issue to be determined is whether an abuse of discretion has taken place. Thus, in Moselein and Carr, we applied the principal embodied in the constitutional limitation in reviewing whether the Board of Pharmcy's discretionary act of revoking a license was "inappropriately harsh", and therefore an abuse of discretion. In the present case, however there was no discretionary action upon the part of the Department. The Department was required to revoke Appellants license under the provisions of Section 1532 of the code. Appellant's complaint,

therefore, is not with the Department's excercise of discretion, but rather with the provisions of the statute itself. Although the principle relating to cruel and unusual punishment may be applied in a civil context, it does not itself rise to the level of a constitutional requirement in such context, and thus cannot give us the constitutional authority to inquire into the appropriateness of a civil sanction mandated by statue.

Appellant perceives his revocation as punitive only, and thus complains that his illness during the time of his offenses should be considered in mitigation of his punishment. It should be noted, however, that driver revocation proceedings are remedial sanctions and are civil in nature, designed to protect the public from unsafe

drivers. Zanotto v. Department of Transportation, 83 Pa. Commonwealth Ct. 69, 475 A.2d 1375 (1984). Thus, the revocation is not so much punishment imposed upon Appellant for his level of culpability in the matter, as it is protection given to the public against Appellant's demostrated unsafe driving habits. Indeed, health conditions such as those Appellant has alleged to suffer from can themselves justify the denial of a drivers license, regardless of whether the driver has committed an offense under the Code. See Section 1519 of the Code, 75 Pa. C,S. § 1519.

Finally, Appellant's argument that he cannot be considered a "habitual offender" because his three convictions were all the result of a single episode is without

merit. We have already considered this argument in Reese v. Department of Transportation, 71 Pa. Commonwealth Ct. 244, 455 A.2d 232 (1983), and have concluded that the three separate and distinct offenses required under Section 1542 are not merged into a single act merely because the conduct occured during one continuous episode.. Id. at 247, 455 A 2d at 234.

For the foregoing reasons, we conclude that the court of common pleas did not err in affirming the Department's action revoking Appellant's driver's license. See Yeckley v. Commonwealth, 81 Pa. Commonwealth Ct. 576, 474 A 2d 71 (1984). Accordingly, we affirm the order of the court of common pleas which dismissed Appellant's appeal.

Joseph T. Doyle, Judge

APPENDIX 21.

FOOTNOTES

1. Section 3731 of the Code, 75 Pa. C.S. § 3731.

2. Section 3734 of the Code, 75 Pa. C.S. § 3734

3. Section 3733 of the Code, 75 Pa. C.S. § 3733

4. Section 1532 of the Code makes reference to Sections 3731, 3733, and 3734 of the Code, the Sections under which Appellant was convicted..

5. The same result has been reached with respect to the 8th Amendment to the United States Constitution, Zwick V. FREEMAN, 373 F 2d 110 (2nd Cir.) (1967), cert. denied, 389 U.S. 835 (1967).

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY PENNSYLVANIA

CIVIL DIVISION

COMMONWEALTH OF PA	)	No. SA 506 of 1982
	)	
	)	STATUTORY APPEALS
vs.	)	DOCKET
	)	
	)	Date of violation:
JAMES F. DROGOWSKI	)	September 23, 1981
	)	
Operator No. 13647546	)	Date of Notice:
		June 9, 1982

ORDER OF COURT

AND NOW, this 22nd day of October 1982.

The Appeal having come on for hearing, upon consideration therof, it is hereby ordered the Appeal of the is dismissed.

By the Court

PAPADAKOS, A.J.

Copies of this order
sent to all counsel
and/or parties of record.

APPENDIX 23

IN THE COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH	)	
	)	
vs.	)	No. 1088 of 1981
	)	
JAMES F. DROGOWSKI	)	

ORDER

AND NOW, this 27 day of August, 1982, after hearing and upon consideration of the record, evidence and testimony presented, defendant's motion to withdraw guilty plea nunc pro tunc is denied.

_____

John F. Bell, J.

APPENDIX 24.

MEDICAL EXAMINATION

Mailed 07-23-82

NAME JAMES F. DROGOWSKI

Date of Birth 02-11-49

ADDRESS 3316 Washington Pike

Bridgeville, Pa 15017

Birthplace Pittsburgh

Time at Present Location 12 years

Education High School

Marital Status Single

No. of Marriages None

Wife's Name --

No. of Children --

Veteran Yes

Employed Yes

Last Employer Cameron Construction

Medical History Negative

Age First Smoked Marijuana 21

First Drink 21

History of Addiction Marijuana 11 years

Last Year & Drug Used 1981 Marijuana

Last Time Used Drugs 1981

Dosage

Times Used 2 to 3 a day

Prison Record 5 days (1981) Driving while Intoxicated

Past Treatment Veterans Hospital
Thorazine 300 mgm per day
6 months

P.E. B.P. 110/70 P. 72 HT. 71 1/2"

WT. 167

EYES

NOSE Normal

EARS Neg.

Mouth Normal

Thyroid Neg

Lungs Clear

Heart Normal

Abdomen Neg

Genitalia Normal Male

APPENDIX 26

EXTREMITIES Neg.

Frank H. Rittenhouse, M.D.

92 Bradford Avenue

Pittsburgh, PA 15205

Date of Report 8/7/82

From a Medical Standpoint only, Do you Consider That the Patient Can Be a Safe And Competent Driver? Yes

Is the Patient Now On Methadone? No

If Yes How Long?

Oper. #13-647-546

Drogowski, James F.

Mailed 07-23-82

GENERAL PSYCHIATRIC FORM

1. How long have you been treating the patient and for what diseases and conditions? Since childhood: colds pharyngitis, Flitis

2. Does the patient have any significant impairment of any of the following areas:

   a. Attention (confusion, clouding or lapses of consciousness, distractibility, reduced time, preoccupation, repetitive states of inattention, etc.)? No

   b. Intellectual functioning (memory defects, capacity to organize a sudden complex series of stimuli mental retardation, etc.)? No

c. Perception (visual and auditory hallucinations, delusions, etc.)? No

d. Reaction time. good (normal)

e. Coordination of movement of the extremities? good (normal)

f. Muscular weakness? No

g. Personality factors (irresponsibility, emotional instability under stress, impulsive aggressive behavior, etc.)? Normal

3. With what kind (s) and what quantity of drugs are you treating the patient? Does the medication make him an unsafe driver? No drugs for 6 months

4. From a medical standpoint only, do you consider this person physically and/or mentally competent to operate a motor vehicle? Yes

5. Can he under stress and strain, be

relied upon to reasonably control a motor vehicle under any and all conditions which might arise? Yes

Comments Complete Recovery

Patient's Name James F. Drogowski

Adress 3316 Washington Pike
Bridgeville, PA 15017

Operator No. 13-647-546

D.O.B. 02-11-49

Frank H. Rittenhouse

92 Bradford Avenue

Pittsburgh, PA 15205

License Number 19645

Date 8/7/82

APPENDIX 30.

OFFICIAL

NOTICE

MAIL DATE DEC 13 1982

Date Of Birth 02-11-49

Operator No. 13647546 03

James F. Drogowski

3316 Washington Pike

Bridgeville, PA 15017

As a result of your conviction on 02/19/82 of violating section 3733 on 09/23/81, your operating privileges are being revoked for a period of 5 years as mandated by section 1542 A of the vehicle code.

In order to comply with this suspension/revocation, you are required to return any current operators license or Learner's permit in your possession no later than the effective date listed below.

Failure to comply with this notice

shall result in this bureau referring this matter to the pennsylvania state police for prosecution under section 1571 (A)4 of the vehicle code.

PRIOR OFFENSES

3731	09/23/81
3734	09/23/81

The above mentioned suspension (s)/ revocations (s) is/are in addition to any previously issued suspension/revocation.

Proof of automibile liability insurance must be filed with this bureau before your suspension/revocation will be restored.

Effective date 01/17/84 12:01 A.M.

John A. Pachuta
DIRECTOR
BUREAU OF TRAFFIC SAFETY OPER.
DEPARTMENT OF TRANSPORTATION

APPENDIX 32